IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

INCOME TAX APPEAL NO.539 OF 2002

The Commissioner of Income-tax,
Bombay City-I, Bombay — Appellant

vs.

M/s. Unistar Investments (P) Ltd. — Respondent

Mr. R. V. Desai, senior counsel with Ms.S.V. Bharucha i/b.M/s. H.D. Rathod for the appellant.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 25th August 2004

P.C.

Heard.

2. The Tribunal considered the matter thus:

> "Admittedly, the assessee neither earlier nor later has indulged in any business in real estate. This is the only attempt to carry on business in real estate. But it failed. As can be seen from the profit & loss account, the assessee showed sales of Rs.23,176/- which consisted of the opening stock and the balance of Rs.4,971/- was shown as closing stock. This was the only attempt to deal in the real estate. The Memorandum of Association of the assessee company permits the assessee to deal in real estate. It is in pursuance of this clause that the assessee tried its hand in the business of real estate but since it could not find the resources, it had to forfeit the deposit made in the auction. Even a single venture can amount to a business if the plunge is in the water of trade. It is not the case of the income-tax authorities that the assessee company was trying to purchase a property for its own use or for the use of its directors. In the year 1993, the property

price in Bombay were rising which is common knowledge and the assessee might have thought it prudent to make a profit out of the transaction, which failed because of its inability to find the resources. To me, it appears to be a foray into the business of real estate which failed. The amount has been wrongly described by the AO as penalty though some blame has to be taken by the assessee also for this as the amount was described as penalty in the profit & loss account itself. The real nature of the amount is that it is not a penalty but is a deposit towards the purchase price of a flat. The CIT(A) has held that it is a capital loss as it represented a part payment for the flat. But, if the intention was to carry on business in immovable property, the amount cannot be considered as capital, but has to be allowed as part of the cost of the stock in trade. If the transaction had gone through, the amount would have qualified for deduction. But merely because it was unsuccessful, the amount cannot be considered as capital loss. As I have already held, there appears to have been an intention to do business in immovable property. Therefore, the amount must be allowed as a business loss."

3. The consideration of the matter by the Tribunal is concluded on facts.

4. No substantial question of law arises in this appeal.

5. Appeal is dismissed in limine.

(R.M. LODHA, J.)

(J.P. DEVADHAR,J.)